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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1381

JOSEPH N. TOONI and DANIEL L. EDWARDS, JR.,
Petitioners,

v.

ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE ON BEHALF OF DISTRICT LODGE 23; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

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District Lodge 23, International Association of Machinists and Aerospace Workers, Fairborn, Ohio, hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of Petitioners, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for the Petitioners has been obtained. The consent of the attorneys for the Respondents was requested but refused.

District Lodge 23 is the governing body for four lodges which are the exclusive bargaining agent for approximately 4,500 Federal employees at Wright-Patterson Air

Force Base and Defense Electronics Supply Center, Dayton, Ohio.

The federal government's executive branch is the largest single employer in the United States. Therefore, what happens to the integrity, dignity, self-respect and independence of federal workers is of monumental import to *all* American workers.

We believe the above case presents questions of national importance since it affects the appeal and review rights of all federal employees, and further presents an important issue of separation of powers.

The attached brief discusses in more detail the reasons this motion should be granted.

Respectfully submitted,

/s/ CHARLES F. HORN
CHARLES F. HORN
HORN, MOORE & RIFE

BRIEF AMICUS CURIAE ON BEHALF OF DISTRICT LODGE 23, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

QUESTIONS PRESENTED

This case presents questions which go to the very heart of the Separation of Powers Doctrine of the Constitution of the United States. In addition to those questions set forth by Petitioners in their Petition, the following questions present themselves:

1. Does the Separation of Powers Doctrine require judicial review of executive agencies actions?
2. Does the Administrative Procedure Act, 5 USCA § 702, apply to assure judicial review of removal by federal agencies of its employees?

INTEREST OF AMICUS CURIAE

District Lodge 23, International Association of Machinists and Aerospace Workers, Fairborn, Ohio, is the governing body for the following local lodges:

LOCAL LODGE 2065 — representing approximately 800 employees of the Flight Test Directorate at Aeronautical Systems Division and the Law Enforcement Division, 2750th Air Base Wing.

LOCAL LODGE 2284 — representing approximately 700 employees both salaried and wage board of Defense Electronics Supply Center and Central Heating Plant.

LOCAL LODGE 2333—representing approximately 2,500 employees of the 2750th Air Base Wing Wage Board.

LOCAL LODGE 2331 — representing approximately 500 employees of the Base Restaurant System and Base Exchange.

Each of these lodges is the exclusive bargaining agent for the employees involved.

District Lodge 23 is affiliated with the Grand Lodge, IAM&AW.

Since the federal government is the largest single employer in the United States, the review afforded federal employees affects millions of individuals and their families.

In private industry, employee grievances, even those based on "internal rules" agreed upon between a Union and an employer, or even the unilaterally imposed "rules" of employment set by a private employer, may, after the "internal administrative procedures available" have been exhausted, take the substantive issues to the Federal court system, for consideration of the *merits* of the case.

In the public sector, as compared with private industry, and most ignominiously in the *Federal* portion of that sector, such rights are non-existent.

The apparent theory relied upon to justify limited judicial review is that the judicial branch should not interfere with the day to day operation of the executive branch. However, the Separation of Powers Doctrine was conceived to guarantee a "check and balance" against the other two branches of government.

District Lodge 23, International Association of Machinists and Aerospace Workers, has a duty to protect the rights of the federal employees it represents and quite naturally takes a keen interest in the outcome of adverse actions against federal employees. More specifically, this Union has an obligation to speak up when unhealthy trends begin developing. In the instant case the trend of limited judicial review is already far down the road to erasing the constitutional right of judicial review.

ARGUMENT

The first question involves the issue of Separation of Powers.

The cases of *Myers* v. *United States*, 272 U.S. 52 (1926) and *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935) set forth the historical, legislative and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered.

The government apparently takes the position that judicial review of an agency removal is limited. The government would have this Court believe that the function of a reviewing Court in cases of this kind (appeal of agency removal) is limited to determining whether there has been substantial compliance with the applicable procedures and statutes and not look into the merits of the dismissal. True, there is a line of authority for this approach.

However, there is another line of authority holding in effect that an employee must exhaust his administrative remedies before applying for judicial relief. Tooni and Edwards exhausted their administrative remedies, but they have been unable to obtain redress in the Courts.

The issue that now presents itself becomes a matter to be resolved by the Supreme Court of the United States. Does the Separation of Powers Doctrine apply, to review actions by the executive branch? If so, is it proper for the present cases to be summarily dismissed based upon the Sixth Circuit cases which did not present the same legal and factual questions? *Fass* v. *Ruegg*, 379 F.2d 216 (CCA, 6th, 1968); *Baum* v. *Zuckert*, et al, 342 F.2d 145 (CCA, 6th, 1965).

The question that prompts this brief *amicus curiae* to be filed is one of principle. We agree that Petitioners' Tooni and Edwards have not received adequate judicial review.

We are concerned that thousands of other federal civil service employees in like circumstances may not receive proper judicial review unless guide lines are laid down by this Court as to when the judicial branch will perform its function of review and when it will not. Counsel finds that the cases cited by Petitioners, such as *Louks* v. *United States*, 395 F.2d 993 (Ct. Claims 1968) and *Scott* v. *Macy*, 349 F.2d 182 (CCA, D.C. 1965), approach review on the merits. Yet in the present cases there seems to be no review at all.

And of all branches, the executive is the branch in which excess of power is most dangerous to the overall concept of a democratic society because what becomes matter of fact procedure internally within the power structure of the executive branch may by that very ordinariness, become the established "fact" upon which the rights and freedoms of all citizens may one day be based. If this matter of fact system happens to be totalitarian, authoritarian, unilateral, capricious and whimsical, and if it extends by osmosis from within the executive system of the federal government to the dependent industrial contracting system and from there into the total employing enterprise system in the nation—then our "democracy" will have been totally destroyed.

The second question consists of the applicability of the Administrative Procedure Act to agency removals.

5 USCA § 702 provides as follows:

> "§ 702—Right of Review
>
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

§ 703 provides that in the absence or inadequacy of special statutory review, . . . "the form of proceeding for

judicial review is . . . any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

The Congress wisely made administrative decisions subject to judicial review. *Blackmar* v. *Guerre*, 342 U.S. 512 (1952) does not answer this question due to the fact that the District Court had proper jurisdiction by virtue of 28 U.S.C.A. § 1361.

CONCLUSION

This case presents important questions of national concern. Serious consequences may result if the executive branch by virtue of its agency, the Air Force, making decisions on its own, slowly but surely becomes a superior being—perhaps abusing its power to the detriment of millions of Americans who can no longer protest because we are too far down the road of limited judicial review.

Respectfully submitted,

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